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FEDERAL HEARING EXAMINERS

CIVIL SERVICE REPORT

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"For many reasons the report which appears on the following pages is an enduring administrative law document. It is one of the more fundamental early fruits of the Administrative Procedure Act of 1946. Among the least significant of its features is the announcement that some federal administrative trial examiners should be removed for inexperience or incapacity. Much more important is the fact that it describes the beginnings of a system of great promise for the selection of what amount to administrative judges in federal agencies. It is not only a notable example of service (uncompensated) by members of the legal profession but also a welcome instance in which an agency of the United States has thus utilized the great resources of the bench and bar in peacetime. It is a long step forward in the creation of a corps of judicial officers worthy of the Executive Branch of the government of the United States. It is another hopeful chapter in the reform of administrative law initiated by lawyers a decade or so ago. It is living proof of the determination of the nation to preserve in the flesh its tradition of government under law."—Statement of Congressman Francis E. Walter who pioneered this field in Congress and, as subcommittee chairman, introduced the final form of bill (H.R. 5988, 79th Congress) which became the Administrative Procedure Act.

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The consultants designated by the United States Civil Service Commission submit the following as their first general written report to the Commission:

I. HISTORY, OBJECTIVES, AND PROBLEM

As necessary background it will be desirable to mention first (1) the origin of the project, (2) the appointment of consultants, (3) the standards and limitations applied, and (4) the several different classes of persons examined.

1. ORIGIN OF THE PROJECT. No attempt will be made here to discuss the long history of studies, reports, and legislative proposals which led to the present undertaking. They are summarized in the Report of the Committee on the Judiciary of the House of Representatives with respect to the Administrative Procedure Act (Report No. 1980, 79th Congress, pages 7-16; also Senate Document No. 248, 79th Congress, pages 241-250).

The group of consultants was established and appointed by the United States Civil Service Commission pursuant to the responsibility conferred by Section 11 of the Administrative Procedure Act of June 11, 1946.

The whole of the Administrative Procedure Act is important in understanding the policy adopted by Congress and the Executive with respect to examiners in "formal" administrative cases. Section 7(a) provides that only the heads of agencies or examiners may serve as presiding officers, which in general and with few exceptions means that only examiners may perform functions otherwise committed to officers appointed by

the President and confirmed by the Senate. Such examiners, under the same section, must be able to perform those functions in an impartial manner and are subject to disqualification in particular cases. Sections 7(b) and 7(c) demonstrate that they are to exercise their hearing functions judicially. Section 8 provides that, with some exceptions, they are not only to hear cases but to take an important part in the decision of cases. Sections 9 and 10 emphasize that their actions must conform to law.

Section 11 of the Administrative Procedure Act provides that examiners shall be qualified and competent, perform no duties of a nature which would be inconsistent with their functions as examiners, and enjoy independence and security of tenure. It also provides that, consistent with the Act, these objectives are to be carried out within the framework of the Civil Service system and for that purpose the Civil Service Commission is given special powers. Section 11 thus reads in full as follows:

> Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or

temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

Pursuant to Section 11 of the Administrative Procedure Act the Civil Service Commission first appointed an advisory committee to recommend requirements and procedures. It assisted the Commission in classifying examiner positions, proposed regulations, and suggested minimum qualifications for examiners. The Commission then held a public hearing at Washington, D. C., where members of Congress and representatives of agencies, the public, and interested professional organizations stated their views. Thereafter the Commission issued regulations (12 F. R. 6321, September 23, 1947).

Section 34.3(a) of those regulations provides that incumbent examiners with full or competitive Civil Service status "may be given absolute appointments as hearing examiners * * * if they are found by the Commission to be qualified and competent to perform the duties of hearing examiners." Such examiners must have been serving in positions which became hearing examiner positions on June 11, 1947, and must have been conditionally appointed to such positions under the Administrative Procedure Act on such date. The Commission's simultaneous release of September 22-23, 1947, states that for this purpose the Commission would establish the present group of consultants, that the latter would develop standards that in accordance with such standards the Commission would make a complete qualifications investigation of each incumbent, that such incumbents would be required to appear before the consultants for oral interviews, and that only those incumbents whom the consultants found "eminently qualified" to be hearing examiners would receive regular appointments under the provisions of the Administrative Procedure Act.

It is to be noted that the foregoing applied only to persons who (1) had full civil service standing and (2) were actually performing examiner work. But thereafter, in May 1948, the function of the consultants was extended to the determination of the qualifications and eligibility of (1) so-called "war service" or "temporary" incumbent examiners and (2) applicants for examiner positions who were either non-examiner government employees or outsiders engaged in private professional work or state or local government service. The consultants were thus asked to function with respect to all present or prospective examiners who are subject to the Administrative Procedure Act.

2. CONSULTANTS AND ASSOCIATES DESIGNATED. There are, in fact, two groups of consultants. The first, appointed at the close of 1947, consists of Douglas L. Edmonds, Associate Justice, Supreme Court of California; Joseph W. Henderson of Philadelphia, former president of the American Bar Association; Laurance M. Hyde, Associate Justice, Supreme Court of Missouri; Wilson M. Matthews, Examiner, United States Civil Service Commission; Carl McFarland, chairman, practicing attorney of Washington, D. C., and former Assistant Attorney General; and Willis Smith of Raleigh, North Carolina, former president of the American Bar Association. These have remained the principal group to date.

When the consultants' function was extended to war service and temporary incumbents and

outside applicants in May 1948, on the recommendation of the original group of consultants the Commission appointed the following advisory consultants or associates to function in the several regions of the country: Albert Ewing of Nashville, Tennessee, delegate of his state to the governing body of the American Bar Association, for part of the South; Chester T. Lane of New York City, former general counsel of the Securities & Exchange Commission, for New York and New Jersey; Clarence A. Miller of Washington, D. C., vice president and general counsel of The American Short Line Railroad Association, for the District of Columbia, Maryland, Virginia, and West Virginia; Morris Mitchell, practicing attorney of Minneapolis, for Wisconsin, Minnesota, North Dakota and South Dakota; Charles B. Stephens of Springfield, Illinois, executive secretary of the Illinois State Bar Association, for Illinois and Indiana; Robert G. Storey of Dallas, Texas, Dean of the Law School at Southern Methodist University and president of the Texas State Bar Association, for Louisiana, Oklahoma, and Texas; and Glenn R. Winters of Ann Arbor, Michigan, secretary-treasurer of the American Judicature Society, for Michigan. In addition, Chief Justice Carl V. Weygandt of the Supreme Court of Ohio and Associate Justice John V. Spaulding of the Supreme Judicial Court of Massachusetts agreed to cooperate in the same work on an entirely informal basis with respect to applicants from their respective states. The original group of six consultants have aided in the regional work at their places of residence.

3. STANDARDS AND LIMITATIONS TO BE APPLIED. The Commission required the consultants to operate within two concepts. Examiners, or applicants for certification to eligibility for examiner positions, must (a) have had stated general and special experience and (b) demonstrate specified aptitudes or abilities. These requirements are established by the Commission's Examining Circular EC-17 issued October 21, 1947. They may be briefly described as follows:

a. Prerequisite general or special experience. As a prerequisite to consideration, any incumbent or applicant must first demonstrate that he or she has had at least (i) six years' experience of a professional nature, of which the simplest and most common example is six years' practice or government service as a lawyer, including (ii) three to six years of "specialized experience". The latter means experience in the special fields of governmental or private endeavor loosely known as "administrative law" or "public regulation". Examiner positions are of several different professional "grades" under the federal employee Classification Act and, under the Commission's regulations for examiners under the Administrative Procedure Act, the higher the grade (and the salary) the greater the number of years of specialized experience required.

Pursuant to the Commission's instruction that the consultants develop standards, there is attached as Exhibit A a statement of the premises formulated and followed by them, together with examples, in applying the rule of the Commission requiring as a prerequisite that incumbents or applicants shall have had general or special experience of specified duration for the several grades of examiner positions.

It is also to be noted that, as required by the Commission, general or special experience must have been "progressively responsible". Thus experience so long past as to invite doubt of present ability may not qualify an applicant.

Finally, the Commission requires that previous experience in each case must be such as to "demonstrate conclusively" possession of the required aptitudes and abilities discussed next.

b. Individual aptitudes, abilities, and temperament. In addition to the demonstrated possession of the required general or special experience as set forth above, the Commission has provided that incumbents and applicants must have "demonstrated conclusively" their possession of certain aptitudes and abilities. These may be fairly summarized as the general ability to act independently, objectively, efficiently, and fairly as an administrative judge — which in this case means, more specifically, the ability to preside at hearings with dignity and command, to assure that necessary factual information is developed for the record at a hearing, to analyze evidence and interpret and apply law or policy correctly, and to write decisions or recommendations of high quality. Of course the case of an incumbent or applicant will be aided to the extent that he can further show either diversity of experience or broad knowledge of the technical and other special factors involved in his field of special competence. It should be emphasized, however, that the consultants have sought generally apt, able, and temperamentally fitted examiners—not specialists in particular subjects such as radio, railroads, or rates. *"The applicants must also show conclusively that they are persons of judicial temperament and poise."*

The application of these directions has largely required the judgment of the consultants in individual cases involving an infinite variety of personal qualities, attributes, and combinations thereof.

4. CLASSES OF INCUMBENTS AND APPLICANTS. Before coming to matters of method and results, it will be helpful to differentiate between several groups of persons who have been subject to the scrutiny of the consultants.

a. Status incumbents. First are those presently doing examiner work with full or competitive civil service status, who were serving in positions which became hearing examiner positions on June 11, 1947, and were conditionally appointed to hearing examiner positions under the Administrative Procedure Act on that date. This means that they are government employees of substantial periods of service. The rules and procedure of the Commission contemplate that they be examined first and specially.

The Commission has directed that only "eminently qualified" status incumbents be approved by the consultants. It is also to be noted that, under the regulations, incumbents or applicants may show the nature and extent of their prior experience in writing or orally up to the time the consultants act on a given case.

b. Non-status incumbents. Next are persons in examiner positions who were either appointed during the war, and hence could not acquire full or competitive civil service status, or who have been appointed, transferred, or promoted to such positions after June 11, 1947, when section 11 of the Administrative Procedure Act became effective. These people compete with other government-employee applicants and complete outsiders.

c. Non-examiner government employees. A third class which should be mentioned are federal employees who are not examiners but have applied for certification of eligibility for such positions. These people have in many cases been

in a position to obtain valuable experience in public regulation and so-called administrative law. Similarly, many employees of state or local governments have made application for certification, and here too their positions have in many cases afforded them opportunity to acquire valuable qualifying experience.

d. Private practitioners or specialists. The last group are the private practitioners or specialists. Very often they have had some public service experience. In the towns and smaller cities their experience is apt to be widely diversified. But the number of applications of persons of high examiner quality from metropolitan areas has been disappointing. Indeed, apart from the special and temporary case of the incumbents, it must be admitted that the number of well qualified applicants from the ranks of non-examiner government personnel and from private practice or specialization is disappointingly low. The ratio of high quality privately occupied applicants definitely increases in those areas where an active representative of the group of consultants is available to publicize the opportunities or to consult with those interested — a situation which suggests that consultants may have recruiting ability of appreciable value.

e. "Chief" examiners. An unexpected development has been the emergence of a serious problem when agencies ask that consideration be given the case of fairly numerous administrative officers who are called "chief", or "assistant" or "associate" chief, examiners. Very few agencies do not indulge in the practice of having such officers as a part of their examiner set-up. Whether they do or not is of no concern to the consultants. But it does concern them to be asked to certify that such persons are incumbent examiners when they are in fact either not performing examiner functions or are doing so to a necessarily limited extent. This does not mean that the consultants would see objection to a chief examiner who had no substantial administrative duties and who, like the chief justice of a court, is merely the spokesman or first among equals.

On the other hand, and without seeking to have them certified also for permanent appointment as working examiners under the Administrative Procedure Act, so far as the consultants are concerned any agency may, if it desires, have "chief examiners" or "assistant" or "associate" chief examiners for the assignment of cases, keeping of records, and other office management functions. If so, no reason appears, even apart from the Administrative Procedure Act, why agencies should desire to confer security of tenure and compensation upon such administrative officers.

Some agency heads have requested the consultants to express views as to the proper organization of an examiner corps for an agency. Although that problem undoubtedly differs more or less from agency to agency and advice upon it is not a function of the consultants, the latter can say that in the course of their work they have become convinced that one of two serious defects too often results from a chief-examiner form of organization. Either the chief examiner becomes immersed in "housekeeping" routines which do not require an examiner's services, or he becomes a directing executive destructive of the initiative and independence of his flock who under the Administrative Procedure Act are supposed to be freed of such influence.

In any event the consultants have declined to consider administrative officers as examiners, even if they hear an occasional case. In some instances agencies have certified that chief examiners (or associate or assistant chief examiners)

were assigned to the duties of a bona fide hearing examiner position when in fact the individuals concerned did not perform true examiner duties. Hearing examiners, it is true, may properly have some duties other than those of conducting hearings or making or participating in decisions, and for that reason the consultants have considered the actual work of these individuals over a reasonable period of time. If that scrutiny did not disclose real examiner work as of June 10, 1947, the individuals have been rated as any other non-status or non-incumbent applicant and, if found eligible, placed on the register for appointment to examiner positions in competition with other non-status or non-incumbent applicants.

II. METHOD OF OPERATION

The week of February 9-14, 1948, was devoted to meetings with representatives of agencies, with representatives of the federal examiner corps, and with the Commission. Thereafter the consultants operated singly or in panels of two or more for the purpose of individual cases. But the whole group met repeatedly for the transaction of general business or the discussion of policy and procedure. Associates of course operated singly in their regions except when invited to sit in at meetings of the main group or its panels. Oral interviews or examinations were conducted with all incumbents and with such non-incumbent applicants as seemed qualified on the paper record they had submitted.

Generally, if a case reached the rating stage, the incumbent or applicant was graded on the customary college scale — A, B, C, D, E, and F with pluses or minuses and C the passing grade. Thereafter the individual or panel, who had conducted the oral interview-examination and made the initial rating, has discussed the case at a meeting of the consultants or submitted ordinarily detailed findings by mail. In November-December 1948 all incumbent cases had been completed and, for the purposes of this first report, the list of non-incumbent applicants was closed. Results were reconsidered, particularly with a view to making the determinations in individual cases further uniform and equitable. (A post-audit of the results indicates that panels of two or three members tended to more uniform, and slightly more conservative, ratings.) Findings have been made in each case, and ratings and grade levels have been assigned. Consultants disqualified themselves in cases in which they felt they might be prejudiced or partial. They have authorized their chairman to authenticate action in individual cases except that, when he has disqualified himself in a case or is otherwise unavailable, any other consultant may do so.

In other respects the method is best described by classes of personnel as follows:

1. STATUS AND NON-STATUS INCUMBENTS. In the case of all status incumbents of examiner positions, and of non-status incumbents who had been in examiner positions for some time, there was first a careful investigation conducted by picked, legally-trained, and well qualified investigators of the Commission operating under the direction of the consultants. This investigation included interviews with associates of, and practitioners before, the incumbent as well as a review of his personnel record and the quality of his work. Thereafter each incumbent was interviewed by a panel of two or more consultants, who at that time or theretofore also examined specimen records and reports in cases conducted by the person so examined. When all con-

sultants present at the interview-examination were satisfied that nothing would be gained by further time (well over an hour was the usual interview period per case), the incumbent was excused and each member of the panel recorded his vote and judgment secretly. Immediately thereupon each read what he had so written, the chairman if present and participating announcing his last. Then the next case was immediately called or the session was adjourned. In only a few cases, no matter how many consultants participated, did the several votes and judgments vary in range more than, for example, between C and B. Ordinarily there might be a difference of at most a C, a C plus, and a B minus; or an A, an A minus, and a B. In the usual case two or three panel members would reach the identically same conclusion so that, for example, there would be a C and two C pluses.

2. **NON-EXAMINER GOVERNMENT EMPLOYEE APPLICANTS.** The application papers of all applicants other than incumbents were examined by the Commission member of the consultant group who, if he found a lack of prerequisite experience qualifications as set forth hereinbefore, marked the application "ineligible" and thus finally disposed of it for present purposes. Applicants from the federal service, who were not in examiner positions, were then usually assigned to the two consultants and one associate resident in the Washington, D. C., metropolitan area for examination and rating. They first divided the cases. Two of them chose to operate as a panel of two on all their cases. The other chose to operate alone as authorized by the group. Each reported orally on his findings and judgment in each case, and discussed any doubtful or general problems encountered, with the full group at its November-December 1948 meeting.

3. **OUTSIDE OR PRIVATE PRACTITIONER APPLICANTS.** If found eligible in the preliminary screening of papers submitted, all other applicants were ordinarily investigated, interviewed, and examined by a single consultant or one of the associates located in the region in which the applicant resided. They reported their judgment and findings in each case either by mail or orally at the November-December 1948 meeting. All such cases were either discussed with, or carefully reconsidered on the paper record by, regular consultant members of the group.

4. **FUTURE CASES.** Presumably the future method of operation will remain essentially the same until changed by the consultants or Commission. Investigation and examination of incumbent examiners will, of course, not recur. The consultants, later in this report, recommend certain changes in method. Naturally, there will be fewer cases to consider and fewer vacancies to be filled in agencies or on the register.

III. RESULTS IN SPECIFIC CASES TO DATE

The consultants understand that they will not publish their results in individual cases of incumbents or others, nor would the Commission normally do so. The consultants have not attempted to determine loyalty questions; pursuant to the Commission's instructions those are left to the Commission's loyalty review program, to which the action of the consultants is subject in each individual case. Presumably the Commission will notify agencies respecting action on their incumbents, and an individual letter will also be addressed to the incumbent himself. Non-incumbents will receive the usual form-letter notification. It may, however, be useful to give here

the statistics of the results reached by the consultants:

1. STATUS INCUMBENTS. The consultants have not found it possible to apply literally the "conclusively demonstrated" and "eminently qualified" standard adopted by the Commission. But, despite more liberal approach, the number of disqualifications is substantial. Almost all of them are grounded upon (1) lack of the prerequisite experience or (2) abilities indubitably very mediocre at best. Only a handful of the disqualifications are based upon a judgment and finding of bias, prejudice, or lack of objectively judicial temperament. Statistics are given in Table I. By agencies, the same results are shown in Table IV.

2. ALL OTHER APPLICANTS. Non-status incumbents must compete with applicants from non-examiner positions and private life. Thus, while a status incumbent may retain his position though rated only C by the consultants, a non-status incumbent may not so long as there are people with higher ratings on the register.

Since as explained above the consultants adopted a liberal rule for the grading of status incumbents, they have met with difficulty in the grading of non-status incumbents and non-incumbents because, presumably, the standard should be uniform as between the several classes of persons rated. On such a basis, non-status incumbents and non-incumbents become eligible for the register if they achieve a rating of C minus. But it would more nearly meet the quality of person sought by the Commission—that is, persons whose prior experience and performance "demonstrate conclusively" that they are "eminently qualified"—if a grade of B minus or

TABLE I

STATUS INCUMBENT STATISTICS

Total number of status incumbent examiners	148
Number lacking required experience	14
" " ability or aptitude	28
Total found not qualified under Commission rules and standards	42
Total found qualified for permanent and unconditional appointment	106

TABLE II

NON-STATUS INCUMBENT STATISTICS

Total number of non-status incumbent examiners	69
Number lacking required experience	8
" " ability or aptitude	4
Number found not qualified under Commission regulations	12
Total graded C minus or better	52
" " less than B minus	20
Total at B minus or better	32

NOTE: These figures include 44 persons appointed to examiner positions since June 11, 1947. Such appointments required preliminary approval of the Civil Service Commission. The incumbents so appointed were required to be selected from applicants for consultant approval after conditional approval by the Commission in the specific case. This system permitted agencies to maintain their examiner staffs during the period covered by this report if they desired to do so. The total of 69 includes 5 recent cases not completed at the date of this report.

better could be established as a passing mark. Since it appears that such cannot be done under present policy and practice, it is the hope of the consultants that the same result will be achieved by the maintenance of a register which, by a sufficiency of highly rated and graded eligibles, will make it unnecessary and impossible for agencies to select persons who are on the register but are rated below B minus.. To this end continued recruiting is required and should be a primary concern of the Commission and other interested parties as well as of the group of consultants.

On this basis the results of the work of the consultants respecting non-status incumbent examiners are shown in statistical form in Table II. The same results, by agencies, are shown in Table IV.

The results with respect to all other applicants are shown in statistical form in Table III. The figures are self-explanatory. There, unlike the other classes of applicants, some have been disqualified because, for lack of prerequisite experience, they were not eligible for the high grade of position they stated as the minimum post they would accept. These figures indicate that recruiting may become a chief difficulty if the Commission's high standards are to be maintained. However, with increased knowledge of the system and opportunities as well as fewer vacancies to fill, that problem does not appear insurmountable.

3. **BY AGENCIES.** No purpose would appear to be gained by publicizing the incumbent statistics by agencies. The several agencies which have applied for permanent appointment of incumbents are the Agriculture Department, Civil Aeronautics Board, Civil Service Commission,

TABLE III

NON-INCUMBENT EXAMINER APPLICANT STATISTICS

	Public employees	Private practitioners	Total
I. Number of applicants to 1-19-49	—	—	1499
" Found ineligible on original review of applications	512	237	749
" Found eligible for examination	—	—	625
II. Number of applicants disqualified after examination	279	134	413
" " for lack of experience	163	77	240
" " for lack of ability, etc.	98	53	151
" " for grade demanded	18	4	22
III. Total number of applicants qualified after examination	132	80	212
" " " under B−	27	20	47
" " " at B− or better	105	60	165

NOTE: Since the examination is a continuing one and additional applications are constantly being filed or processed to final conclusion, the foregoing figures will rapidly change by the addition of new applicants and new consultant actions in specific cases. Ninety recent cases are as yet unassigned and 35 cases, though assigned, have not yet been reported ready for final action.

Federal Communications Commission, Federal Power Commission, Federal Security Agency (Bureau of Old Age & Survivors Insurance, and Food & Drug Administration), Federal Trade Commission, Interior Department (Office of Indian Affairs and Bureau of Land Management), Interstate Commerce Commission, Labor Department, Maritime Commission, National Labor Relations Board, Securities and Exchange Commission, and Treasury Department (Alcohol Tax Unit, and Coast Guard). In terms of results reached by the consultants and without identifying the agencies, statistics respecting incumbent applicants by agencies are shown in Table IV. There it appears that there is a wide disparity in the present standards and practices of the several agencies so far as their examiners are concerned.

IV. FURTHER IMMEDIATE PROCEDURE

Pursuant to the Commission's standing instructions to the consultants to make such recommendations as they may deem appropriate, it is suggested that the Commission make due provision for (1) the prompt effective date of the adverse determinations respecting individual incumbents, (2) orderly access by agencies to the register of eligibles, and (3) the establishment of a system of full consultant reconsideration and Commission review upon the request or appeal by any agency or applicant adversely affected. These suggestions may be explained as follows:

1. EFFECTIVE DATE OF DETERMINATIONS IN INDIVIDUAL CASES. After such consideration and action as the Commission itself may desire to take in individual cases or respecting the whole problem, it is suggested that

TABLE IV

INCUMBENT STATISTICS BY AGENCIES

Agencies	Total Incumbents			Disqualified			Qualified		
	Total	Status	Non-status	Total	Status	Non-status	Total	Status	Non-status
A	48	43	5	12	12	—	36	31	5
B	41	20	21	14	8	6	23	12	14
C	30	14	16	10	7	3	20	7	13
D	18	16	2	3	2	1	15	14	1
E	17	4	13	4	4	—	9	—	9
F	16	11	5	1	1	—	15	10	5
G	9	7	2	2	2	—	7	5	2
H	9	8	1	—	—	—	9	8	1
I	9	6	3	2	1	1	7	5	2
J	5	4	1	3	2	1	2	2	—
K	7	7	—	1	1	—	6	6	—
L	5	5	—	3	3	—	2	2	—
M	2	2	—	—	—	—	2	2	—
N	1	1	—	—	—	—	1	1	—
TOTALS	217	148	69*	54	42	12*	158	106	52*

* For the significance of the figures respecting non-status incumbents, see the note to Table II.

the adverse results as to incumbent examiners be made operative promptly except that (1) any such examiner should be permitted to complete any case upon which he is presently engaged but (2) in no event should this period be permitted to extend in any case beyond three months save with the written consent of the Commission for cause. The purpose of the recommendation is obvious—to make it unnecessary for any agency to redo any part of any case already in process, and at the same time to permit the Commission to prevent evasions for any undue period.

2. ACCESS TO NEW REGISTER OF ELIGIBLE EXAMINERS. Not only because of the substantial number of disqualifications found by the consultants but also because many agencies have for some time not been filling examiner vacancies, it is necessary that some means be found to regulate the access of agencies to the comparatively small register so far made feasible. Since it is uncertain what agencies will move first or when, formulation of any hard and fast rule may be impossible at least for a while. However, it is the recommendation of the group of consultants that the Commission authorize its employee member, who is now also the group's executive officer, to regulate the traffic, so to speak, as best he can with such assistance from other Commission personnel as may appear proper and with a view to achieving the maximum purpose of the whole operation.

3. RECONSIDERATIONS BY CONSULTANTS AND APPEALS TO COMMISSION. Every action of the consultant group is, of course, necessarily subject to review and revision by the Commission. It has been understood all along that such would not be the case, however, to the extent that matters of judgment

in individual cases may be involved. The position of the consultants is that (1) they will remain available to reconsider promptly any case upon any relevant ground and (2), because among other things no court would seem to have authority to review these cases, the consultants desire that no impediment be placed against full and painstaking review of any case by the Commission. For these reasons the consultants suggest that there be two phases to the reconsideration-review process within the Commission, as follows:

a. Reconsideration. It is suggested that the consultants be permitted, upon due application by any agency, incumbent examiner, or other applicant to reconsider the grounds of their decision with or without, in the discretion of their chairman, further oral interview-examination by an individual member or a panel of the consultant group. In any case in which new evidence is offered, as for example with respect to prior experience for lack of which an incumbent has been found not qualified, it is suggested that it be mandatory that the case be resubmitted to the consultants for reconsideration.

b. Commission review. After such reconsideration by the consultants as the Commission may see fit to require, it is suggested that next recourse of an appellant be to the Commission. With a reconsidered judgment of the consultants, the Commission should be in a position to pass upon appeals expeditiously after any necessary intermediate preparatory procedures and such oral argument as it may desire to accord the appellants.

V. FUTURE OPERATION AND SYSTEM

The consultants do not assume to foresee, much less now to recommend the solutions for, the

many problems which are bound to appear. It does not seem to them, however, that these are likely to be serious; they are more likely to be in the nature of adjustments necessary or desirable as the system begins to settle down.

There will indeed be two classes of adjustments. *First* will be those which do not involve the qualification of examiners. For example, it will be necessary from time to time to review the classification of examiner positions and assure that incumbents are adequately compensated as contemplated by the Administrative Procedure Act. *Second* will be those problems which involve the qualification of examiners. In this respect the consultants feel that they may presently offer the following several suggestions:

1. CONTINUATION OF THE CONSULTANT SYSTEM. Although at least for a while it seems plain that the group of consultants should be held together and continue to operate, some routine adjustments should be made to ease the burden. These need not be discussed here. Their present quarters and staff should be maintained.

2. AN OFFICIAL EXAMINER ORGANIZATION. The consultants strongly recommend that the Commission immediately establish by regulation an official Examiner Assembly, composed of all examiners unconditionally appointed under the Administrative Procedure Act, to act as an advisory body to the Commission and to collaborate with the consultants. Such an organization should be permitted to organize, elect officers, appoint committees, hold meetings, and engage in any activities not incompatible with its general purposes. The executive officer of the consultants might be assigned to act as such for the Examiner Assembly as well.

3. IN-SERVICE TRAINING, PRODUCTIVITY, AND PROMOTIONS. The consultants find that most present incumbents make insufficient effort to keep abreast of legal or other relevant developments. Their horizons apparently narrow to the routines and confines of their quarters, with an occasional contact through the press (particularly a relevant and active trade press) or in conversation respecting the course of administrative law or the national setting of the work of only the agency they serve. Very few have read official studies, such as the report of the Attorney General's Committee on Administrative Procedure, or even reports of legislative committees bearing directly on the examiners of their own agency.

This regrettable situation should be corrected. The work of the Commission and the consultants over the past year will certainly be futile if high standards of selection are permitted to deteriorate in the individual case after appointment. It occurs to the consultants that the Commission, through its control of the classification and promotion of examiners, may require of them continued and regular reading, study, or even experience beyond the indispensable minimum necessities of their daily work. The problem, incidentally, affords a splendid opportunity for the proposed Examiner Assembly to make recommendations to the Commission for necessary future action.

Related to the need for greater expertness and broader up-to-dateness of the individual examiner is the matter of individual efficiency and productivity. Under present conditions, the consultants have noted in some agencies an appallingly low production record for the average examiner. Increase of real expertness as well as alertness to developments in the relevant related subjects

should, of course, carry with them an increased and better case output on the part of the individual examiner. In any event, security of tenure and compensation must not be permitted to be turned into license for poor individual performance. It occurs to the consultants that the Commission will need to take account of this factor in setting up its promotion registers in each agency. In addition, the Commission should undertake some form of periodic check of examiner performance to prevent abuse of the security conferred upon examiners by the Administrative Procedure Act.

EXHIBIT A

RATING SCHEDULE FOR HEARING EXAMINERS

Examining Circular No. EC-17

Name of examining body—Group of Consultants for Hearing Examiner Personnel.

Location—Washington, D. C.

This schedule was used to assign eligible and ineligible ratings at grade levels covered by this examination, and to classify hearing examiner qualifications of all eligible candidates within the purview of the Administrative Procedure Act (Public Law 404, 79th Congress).

DESCRIPTION OF DUTIES (See Examining Circular EC-17).

MINIMUM QUALIFICATIONS (See Examining Circular EC-17 for detailed statement of requirements).

Examining Circular EC-17 of October 21, 1947 requires general or special experience which has been "progressively responsible" and which has "demonstrated conclusively" the required abilities and aptitudes. Standards differ for (I) general experience and (II) special experience. For the purpose of either type of experience, any veteran is entitled to have added to his actual experience such intervening or subsequent period as he spent in the armed forces of the United States or, if the experience acquired in the armed forces of the United States is found to be of more value to the veteran in arriving at his qualifications for the position of hearing examiner, it is credited as such. In no case is credit given for both during the same period of time.

I. General experience

All incumbents or applicants must have had a minimum of six years of general and special experience. The content of specialized experience is described under the next heading below. From the nature of the case, a sharp distinction is to be drawn between lawyers and non-lawyers. For the lawyer, general experience is the private practice of his profession as a general practitioner or in public service as a lawyer. For the

non-lawyer, general experience must be closely related to what is hereinafter described as "specialized experience" since otherwise the experience requirement would be meaningless. For the general experience requirement, experience of a lawyer will not suffice so far as it consists only of (1) the teaching of the law, (2) service as a lawyer in positions which may normally be filled by non-lawyers, (3) administrative work or supervision, etc.

II. Specialized Experience

Depending upon the grade of examiner position to be assigned, all incumbents or applicants must have had from three to six years of specialized experience. Such experience is of one or both of two kinds. (1) Experience as a judge, master, referee, hearing officer, or similar official of a court of record doing the kind of work generally associated with typical judicial proceedings or (2) responsible public or private service or professional work in regulatory or "administrative law" fields before courts, boards, or officials involving such matters as licenses, common carriers, taxes, workmen's compensation, utilities, regulations, or orders of administrative agencies. A practicing lawyer who regards himself as a general practitioner but has given substantial time in his practice to such matters may have the years so spent counted as specialized experience. But experience such as the following does not constitute specialized experience:

(1) Work as an interviewer, field investigator, or sleuth
(2) Duties connected with courts martial or military justice
(3) Administrative or supervisory work connected with public administration or regulation
(4) Teaching of administrative law, public utilities, etc.
(5) Work as a case or record reviewer of examiners' proposed reports or initial decisions
(6) Mediator, moderator, arbitrator, etc.
(7) Legal secretaries, stenographers, or reporters
(8) Hearing officers in "informal" or conference proceedings
(9) Immigration Inspector, or Immigration and Naturalization Examiner
(10) Loan work
(11) Clemency reviewer

(12) Merchant Marine Inspectors, or Hull Inspector
(13) Committing magistrates
(14) Law clerks to judges or administrative officials
(15) Adjudicators, or rating officers

DEFINITION OF TERMS

Progressively responsible experience is advancement in breadth, variety, difficulty, complexity, and sometimes authority as shown by greater personal accountability for work performed and decrease in supervision received. Mere advancement in salary is not evidence of progression. Progression in legal work is ordinarily measured in terms of greater importance and difficulty of legal proceedings in which the applicant has participated.

DETERMINATION OF GRADE LEVEL

Status incumbent hearing examiners were rated originally for the grade level to which assigned on June 11, 1947. Later, status incumbents will be rated for all levels up to the highest for which they are qualified. This rating will result in placing the incumbent on an agency promotion register. In order to determine eligibility for any grade, a determination is made of the level of qualifying experience offered by the applicant in terms comparable to those of the Federal Classification Plan. Qualifications investigations are used. The major allocation factors used in making comparisons are (1) the nature, variety, complexity, difficulty, importance, etc. of the applicant's prior experience and (2) the degree of independence, originality, judgment, etc. required of the applicant therein. Qualifying experience gained in the federal classified civil service is accepted as so classified unless convincing contrary evidence is presented. As stated in the first report of the consultants and pursuant to the rating factors (considered as a whole) set forth in Examining Circular EC-17, applicants are rated on an alphabetical scale on the basis—in each case—of the experience shown in the application and on information secured from a qualifications investigation, letters, personal knowledge, individual vouchers, etc.

RATING TABLE

General quality groups	Meaning	Group rating range
A	Outstanding	97-100
A−	Superior	93-96
B+	Excellent	89-92
B	Very good	85-88
B−	Good	81-84
C+	Fair	77-80
C	Qualified	73-76
C−	Barely qualified	70-72

ASSIGNMENT OF RATING

The criteria followed in arriving at the rating of an applicant's experience, capacity, and aptitude are (1) progression of experience and training, with particular emphasis on the highest level of competence demonstrated, (2) variety and scope of the relevant experience and training, and (3) expertness in administrative law generally, or in a given field. Ratings are arrived at after consideration of information obtained from interviews and qualifications investigations or otherwise. Each applicant is assigned to one of the basic quality level groups at the minimum rating shown above. Applicants in each such quality group are then evaluated and arrayed in relative order within the group on the basis of the rating factors shown above and by a critical comparison of all applicants in the quality group.

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ADMINISTRATIVE LAW

JULY 15 1949

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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

PROPOSED PRACTITIONERS ACT REPORTED BY HOUSE COMMITTEE

On June 21, 1949, the Judiciary Committee of the House of Representatives reported H. R. 4446, the proposed Administrative Practitioners Act. Subcommittee chairman Francis E. Walter, who had introduced the current bill, submitted the report which is reproduced on the following pages of this bulletin. It is thus an official administrative law document of lasting interest and importance to the bar.

FRANCIS WALTER

The presently reported bill provides for the licensing and discipline of administrative practitioners, for which purpose it defines "practice" (§2), prohibits unauthorized practice (§4), and sets up a method for the admission of lawyers (§5) and non-lawyers (§6). Provision is made for the maintenance of standards of conduct (§4) and for disciplinary proceedings (§7). There are provisions for an administrative committee (§3) and to effectuate the system thus proposed (§8).

Several years ago the American Bar Association authorized its Section of Administrative Law and its Committee on the Unauthorized Practice of the Law to collaborate with members of Congress in framing suitable legislation to regulate admissions to practice before federal administrative agencies and kindred matters. Other interested organizations collaborated, such as the American Institute of Accountants and the Interstate Commerce Commission Practitioners Association. Extensive hearings were held before a subcommittee of the House of Representatives in 1947 and 1948.

While general professional agreement seems to have been reached respecting the terms of the proposed legislation, the administrative problem will be important if it passes. Whether the requisite informed and able personnel can be secured and maintained for the staffing of the proposed Credentials Committee will depend upon the time and effort which interested professional organizations give to the subject, particularly during formative stages of the organization. In that connection the appointment of its full-time Secretary will be of paramount importance. The five-member Committee is to be composed of four top government people and one "attorney engaged in the private practice of law representative of the legal profession". Such direct participation by the bar is designed to assure the continuous and active interest of the organized profession.

Lawyers will be interested in following the course of this legislation closely. Copies of the bill and reports may be secured by writing your senators and representatives. The basic legislative document to date is House Report No. 905 of the 81st Congress. It is reproduced in full on the remaining pages of this Bulletin.

HISTORY, STRUCTURE, AND PURPOSE

Legislation has for years been proposed in the Congress on the subject of admissions to practice before administrative agencies. Some 20 bills have been introduced in recent years.[1] When the Administrative Procedure Act was before the House in 1946 it was earnestly argued that it should contain something on the subject. But it was too large and important for fragmentary treatment as a mere part of the Administrative Procedure Act. Subsequent experience with H. R. 2657 and H. R. 7100 of the Eightieth Congress, as well as with H. R. 1566 of this Congress, has demonstrated the need for separate and more comprehensive provision.

From the earliest times, those who represent other people in the courts and before executive bodies have been subjected to regulation. A lawyer is merely a person who has complied with traditional requirements for a license to practice law. The Government of the United States and its agencies leaves the granting of these permits, at least in the first instance, to the courts of the several States, Territories, dependencies, possessions, and the District of Columbia. But there has been a growing system in the executive branch for the administrative admission to practice, and the administrative control, of both lawyers and nonlawyers. It has come about because, in the creation of new governmental agencies to exercise powers of regulation, there has been a natural development of specialized callings as in the realm of rates and accounting. These new specialists, who operate before administrative bodies, have been necessarily subjected to some control in the matter of their practice there.

This dual system of control—one by the courts and the other by some administrative agencies—has produced a number of perennial problems. The study entitled "Admissions to and Control Over Practice Before Federal Administrative Agencies," report of the committee on administrative practice, Bar Association of the District of Columbia, 1938, discusses many of them. Lawyers, although duly licensed and subject to discipline by the courts of both the Federal Government and the several States, have been unnecessarily required to obtain many special licenses from administrative agencies to do what the courts have already authorized them to do. (See the Final Report of the Attorney General's Committee on Administrative Procedure (1941), S. Doc. No. 8, 77th Cong., p. 124.) In matters of discipline, lawyers have also thus been subjected to the divided control of both the judicial and administrative branches. In addition, agencies often either license nonlawyer specialists or deal with all representatives regardless of their qualifications or standing.

Again, lawyers are subjected to professional and ethical requirements and disabilities, while with some notable exceptions, nonlawyers are generally either not subject to them at all or are

[1] S. 2944, Mr. Wagner, of New York, 74th Cong.; H. R. 9635, Mr. O'Toole, 75th Cong.; H. R. 4798, Mr. O'Toole, 76th Cong.; H. R. 605, Mr. O'Toole, 77th Cong.; H. R. 2526, Mr. Walter, 77th Cong.; H. R. 94, Mr. O'Toole, 78th Cong.; H. R. 4470, Mr. Wickersham, 78th Cong.; H. R. 2323, Mr. Hancock, 78th Cong.; S. 1945, Mr. Lucas, 78th Cong.; H. R. 5237, Mr. Smith of Virginia, 78th Cong.; H. R. 5277, Mr. Capozzoli, 78th Cong.; H. R. 339, Mr. Smith of Virginia, 79th Cong.; H. R. 643, Mr. Wickersham, 79th Cong.; S. 92, Mr. Lucas, 79th Cong.; H. R. 1206, Mr. Walter, 79th Cong.; H. R. 1387, Mr. Hancock, 79th Cong.; S. 572, Mr. Langer, 79th Cong.; S. 740, Mr. McCarran, 79th Cong.; H. R. 3089, Mr. Kefauver, 79th Cong.; H. R. 2657 and H. R. 7100, Mr. Gwynne, 80th Cong.; and S. 746, Mr. Lucas, 81st Cong.

less stringently regulated. Regulation which has been found advisable for the one should surely apply as well to others who undertake to perform similar functions. A nonlawyer who is disqualified from practice before one administrative agency is still left his specialized calling in its non-administrative aspects or before other administrative agencies. But in the court of his admission to practice, a lawyer, subjected to the same type of discipline, normally loses his right to practice his profession anywhere and everywhere. Even more important, however, is the daily subjection of lawyers to extensively stated and judicially expounded canons of professional ethics for which, again with some notable exceptions, there is often no real or effective counterpart among nonlawyer specialists. This lack not only leaves the latter free to disregard accepted ideas of good professional conduct but, in the administrative field, tends to undermine the application of standards of conduct to any practitioner whether he be lawyer or nonlawyer.

If special training and licensing are necessary for practice by lawyers, it is reasonable to suppose that there are similar reasons for controlling practice by nonlawyers. Modern government is so intricate that no man should be permitted to hold himself out as a professional unless he has met professional requirements. To say this is not to disparage the nonlawyer specialist but to place him upon a real professional footing. Moreover, the public is entitled to representation by persons not only of good moral character but equipped with the necessary technical skill and understanding of professional responsibiilties. Practically all of the States have such legislation, which their courts have executed and expounded "for the better security of the

people against incompetency and dishonesty." [2] The Federal Government can afford nothing less for the due protection of the people of the whole United States in their dealings with national administrative agencies.

The present bill, after extensive hearings on H. R. 2657 in the Eightieth Congress, has now been drawn with a view to setting up a system for administrative practitioners which shall be adequate to the needs of today but, at the same time, will utilize past experience and preserve the necessary authority of individual administrative agencies. Section 1 contains only the short title. Section 2 contains definitions. Section 3 provides for a Credentials Committee. Section 4 deals with the regulation of practice. Section 5 simplifies the admission of lawyers to Federal administrative practice. Section 6 provides for the issuance of credentials to nonlawyers. Section 7 relates to disciplinary proceedings. Section 8 contains miscellaneous provisions necessary to effectuate the system proposed.

In short, the bill provides for the licensing and discipline of administrative practitioners. This requires a definition of "practice" (sec. 2) and a method for the admission of lawyers (sec. 5) and nonlawyers (sec. 6). Provision is made for the maintenance of standards of conduct of such licensed practitioners (sec. 4) and for the disciplinary proceedings (sec. 7). Nothing essentially new is proposed, since in each of these aspects of the subject there has been long ex-

[2] *People ex rel. Chicago Bar Association* v. *Goodman* (366 Ill. 346, 8 N. E. 2d 941, cert. denied, 302 U. S. 728). See also the following representative decisions: *Bump* v. *District Court of Polk County* (232 Ia. 623, 5 N. W. 2d 914); *Goodman* v. *Beall* (139 Ohio St. 427, 200 N. E. 470); *People* v. *Alfani* (227 N. Y. 334; 125 N. E. 671); *Opinion of the Justices* (289 Mass. 607, 194 N. E. 313); *Matter of Co-operative Law Co.* (198 N. Y. 479, 92 N. E. 15); *Meunier* v. *Bernich* (La.) (170 So. 567).

perience. The bill simply seeks to shape a system which will operate in modern government with due provision for the functions of a great variety of recently created or newly expanded administrative agencies.

EXPLANATION OF PROVISIONS

In the following explanation there appears each section of the bill in italics followed by a paragraph or more of analysis or explanation:

TITLE

SECTION 1: *This act may be cited as the Administrative Practitioners Act.*

The proposed statute is called a Practitioners Act because it relates to the licensing and regulation of practitioners before administrative agencies. In these days when administrative agencies have taken over much of the work formerly left to the courts, it is timely that there be regulation of such practitioners before such agencies just as there has long been the licensing of lawyers by the courts. Individual agencies have heretofore attempted such regulation, some on an elaborate scale. But many agencies have paid little if any real attention to the matter. Moreover, diverse requirements by the different administrative agencies of the Government are confusing to both lawyers and nonlawyers and in most cases fail to constitute a satisfactory system for even one agency. The provisions and comments which follow explain how it is proposed that regulation of administrative practice be achieved and be given a measure of uniformity by this bill.

DEFINITIONS

SEC. 2. *Terms shall have the same meaning as in the Administrative Procedure Act (Public Law 404, 79th Cong.) except that the term "agency" shall not include the Tax Court of the United States. "Individual" means a natural person. "Credentials" means certificates and other evidence of admission to practice issued pursuant to this Act. "Credentials Committee" means the agency established pursuant to section 3. "Practice" means regularly appearing, participating, or offering to do so on behalf of others for a consideration in agency proceedings as a whole or part of a profession, calling, business, or trade. Nothing in this Act shall prevent appearance or participation in an agency proceeding (1) as a witness; (2) for a limited or special purpose; (3) by an individual on his own behalf; (4) by a partner on behalf of the partnership; (5) by an officer or regular full-time employee of any State, local government, or agency thereof or of the United States on behalf of such government or agency; or (6) if permitted by rule of the agency in any proceeding not conducted pursuant to section 7 or 8 of the Administrative Procedure Act, by an officer or regular full-time employee of a corporation or other organization on its behalf.*

The adoption of the definitions in the Administrative Procedure Act not only simplifies the bill but is significant for present purposes because those definitions limit the bill. Thus "agency proceeding," as defined in the Administrative Procedure Act and hence applicable where used in this bill, means only a regulatory proceeding and therefore does not include advisory functions, commercial-type transactions with agencies (such as some of the work of customhouse brokers), or mere applications or requests for information. Similarly an "agency"

does not include the customs courts or public authorities composed of representatives of parties. Express exemption of the Tax Court has been included to demonstrate the proper interpretation of the Administrative Procedure Act in this regard.

The definition of "practice" is basic to the whole bill. "Regularly appearing, participating, or offering" eliminates occasional instances in which attorneys or others appear before administrative agencies as an incident to some other proper activity. (See also the last sentence of section 5 below.) "On behalf of others" eliminates the appearance of a person on his own behalf to give data or to express views if an agency will otherwise permit him to do so in a given proceeding. "For a consideration" exempts religious, fraternal, benevolent, philanthropic, charitable, labor, veterans, and other organizations of a nonprofit nature in their legitimate fields of endeavor. "Agency proceeding," as explained in the previous paragraph, means only a regulatory proceeding. "As the whole or part of a profession, calling, business, or trade" again emphasizes that the regulated activities are those in which persons engage as a business or profession.

The final sentence of the section enumerates six situations in which the bill does not apply. But, of course, in any of them an agency, within the scope of its powers, may modify these exemptions. The latter are also in many respects merely a specification of exemptions which would follow in any event from the general language of the definition of "practice" as set forth in the previous paragraph. (1) "As a witness" is self-explanatory. (2) "For a limited or special purpose" is designed to take care of those situations in which a person appears not as a formal party for all procedural purposes but merely to present data or views with the permission of the agency involved. Examples are the appearances of boards of trade or chambers of commerce to present, much in the fashion of a witness, the general positions they have taken as to a given matter. Farm cooperatives or labor unions may similarly appear to give evidence or state views. Where they are full parties, as in the case of proceedings brought against them by name, they are normally represented by counsel. (3) An appearance "by an individual on his own behalf" would include those persons who in the contemplation of law stand in the stead of any individual. Thus an individual may be represented in an appropriate case by his parent, guardian, administrator, trustee, and so on. (4) The appearance of a partner on behalf of a partnership is traditional and arises out of the legal nature of partnerships. (5) The appearance of public officials for public purposes is an apparent necessity. (6) If not exempted by the provisions discussed above, corporate or organizational appearances through officers or employees are limited to proceedings in which sections 7 and 8 of the Administrative Procedure Act do not apply. The reasons for this limitation are that, in the first place, the proceeding is a so-called formal one in which there is a presiding officer and a record is being made much in the fashion of a court proceeding. Secondly, the record is that upon which judicial review may be had so that the proceeding is in effect a part of the court process. However, even then the limitation need not be taken as precluding corporate or organizational appearances by officers or employees because the latter may be admitted to such practice under section 5 of the bill and in certain circumstances under section 6 of the bill.

CREDENTIALS COMMITTEE

SEC. 3. *There shall be established and operative (as the President shall provide by Executive order in conformity with this Act) a Credentials Committee of five members who shall be designated by the Attorney General, serve without compensation, issue certificates of admission and renewals thereof, and perform other functions required by this Act. Three shall be a quorum. Four shall be designated from among officers then serving in the executive branch by and with the consent of the Senate. One shall be an attorney engaged in the private practice of law representative of the legal profession. Not less than three shall hold or be eligible for credentials under section 5. For the purposes of this Act the Credentials Committee shall appoint a Secretary, have such staff, other assistance, or advisory services or committees as may be required, incur obligations, make rules, issue individual notices by mail requiring the renewal of credentials from time to time, fix compensatory admission and renewal fees, and require the submission of necessary information from any person or agency. Receipts shall be deposited in the Treasury of the United States as a trust fund to be drawn upon for the purposes of this Act as the Credentials Committee may direct; and there is hereby appropriated to such fund for such purposes for the fiscal year in which this Act is approved, and for such fiscal year thereafter, the unexpended balance in such fund at any time.*

This section contemplates that a central Credentials Committee shall be created as is often done in the States respecting admissions to the bar. In each of the several States there is a centralized court system headed by a supreme court. But in the Federal Administrative system there is no central or top administrative agency to perform the same function. For that reason it is necessary to create one by this bill for purposes of admissions to practice. However, since its functions will soon become routine, it is to be an uncompensated and ex-officio body as is customary in State practice. It is important that its members shall be high officials in the executive branch. It is also important that the legal profession be represented as is done in the States. Within these limitations as expressed in section 3 of the bill, it is proper that the detail of the set-up be provided by Executive order and thereby remain flexible. The Credentials Committee thus may also be placed in some appropriate department (such as the Department of Justice) for so-called housekeeping purposes.

In order to limit admissions to those who seriously desire to pursue such a calling, and in order to make the system self-supporting, as is often done in such cases, fees should be fixed by the Credentials Committee from time to time on a compensatory basis and be made available to defray expenses. Since applicants for such admissions will run into many thousands, such fees will, however, be modest if not merely nominal. Moreover, in order to prevent the roll of practitioners from becoming out of date and thus causing difficulty in administering the system proposed, it is necessary that the Credentials Committee have authority to require renewals by mail as occasion may require. The authority to "require the submission of necessary information from any person or agency" does not amount to the subpena power but means merely that (1) Federal agencies shall submit relevant data on request and (2) applicants for admission to practice must produce necessary information or run the risk of being denied the credentials they seek.

UNAUTHORIZED PRACTICE PROHIBITED

SEC. 4. *No person shall practice, hold himself out as a practitioner, or in any other manner assume so to practice before any agency without credentials or except as authorized under this Act. Nothing in this Act shall be deemed to permit any person to practice law in any place or to hold himself out impliedly or expressly as authorized to do so. No person shall in any manner or form engage in the solicitation or procurement of employment (involving practice) for another holding credentials hereunder, nor shall holders of credentials participate therein. Practice as attorneys subject to section 5 shall be governed by the canons of professional ethics generally applicable to members of the bar of courts. Agents admitted to practice pursuant to section 6 shall be subject to the same requirements (including limitations on solicitation, advertising, and division of fees) adapted and promulgated in the form of rules by the credentials committee. Individuals admitted to practice under section 5 or 6 shall honor, and presiding and deciding officers in any agency proceeding shall conduct themselves in accordance with, the canons of judicial ethics generally applicable to members of the judiciary.*

The first sentence of section 4, when coupled with the definitions in section 2 above, is the enforcement clause for the whole bill. The second sentence is simply a declaration of the obvious fact that an admission to Federal administrative practice does not authorize a nonlawyer to practice law. The third sentence, prohibiting solicitation through a third party, would not, of course, preclude anyone from recommending, or referring business to, a practitioner upon request and without compensation. The adoption or adaptation of standards of conduct by the last three sentences of the section are necessary because, at least from a technical point of view, the recognized canons of professional and judicial ethics are inapplicable to administrative practice both because it is administrative and because many practitioners are not lawyers. In the absence of such provision, very few administrative agencies have attempted to state or enforce standards of conduct. A large part of the difficulty has been the simple lack of statutory authority for agencies to have and enforce such standards. The bill seeks to remedy this lack.

CREDENTIALS OF ATTORNEYS

SEC. 5. *Any individual shall be given credentials as an attorney by the credentials committee upon (1) the production of evidence that he is a member in good standing of the bar of the highest court of any State, Territory, possession, the District of Columbia, or of any Federal court; and (2) his written statement that he is engaged in the practice of law in such jurisdiction or, if that is not the case, submittal of reasonable and satisfactory evidence of character and fitness. Possession of credentials under this section shall entitle the holder to practice before any agency except that any agency which pursuant to statute has for more than 7 years prior to the adoption of this Act required attorneys to demonstrate additional special technical competence may continue to do so under reasonable rules, and no credentials authorizing practice before such agency shall be issued until such agency shall have certified to the credentials committee that the applicant has met such requirements. Any agency may provide that an attorney with-*

out credentials may act for or represent another solely in connection with a particular agency proceeding.

Under the existing system of administrative practice, lawyers who are already admitted to practice before the highest courts of the land must secure admission to numerous administrative agencies as well. Such repetitious admission requirements for lawyers as such are unreasonable, unnecessary, and provocative of much complaint. However, granted that some form of control is needed for the protection of the public and the administrative agencies, section 5 of the bill provides for one centralized admission. The first sentence of the section restates the general practice in State and Federal courts as well as in some administrative agencies. The exception in the second sentence is designed to preserve the Patent Office system whereby, unlike other agencies with admission requirements, competence and experience beyond that of a member of the bar in good standing has long been required, is expressly authorized by existing law (35 U. S. C. 11), and is generally accepted by the bar. The last sentence provides, as is common in the courts, for admission to practice for the purpose of a particular or occasional case where there is ground for so doing and no evasion of the requirements is apparent.

CREDENTIALS FOR AGENTS

SEC. 6. *So long as and to the extent that any agency shall find it necessary in the public interest and in the interest of parties to agency proceedings before it to authorize practice by individuals not subject to section 5 and provides by generally applicable rule therefor, any such individual may be admitted hereunder to practice as an agent before such agency. The Credentials Committee shall issue credentials to applicants under this section if (1) such agency, after such examination or investigation as it may find necessary for the purpose, determines and certifies that the applicant possesses necessary competence as well as understanding of ethical responsibilities and (2) the Credentials Committee is satisfied that the applicant is of good moral character and repute. The credentials committee shall also issue credentials to individuals who present a certificate from any agency that, prior to the effective date of this section, they have been authorized to practice before such agency and are in good standing there. Under this section no individual shall be admitted to practice in proceedings to which sections 7 and 8 of the Administrative Procedure Act apply or in which the governing statute provides only for appearances in person or by attorney or counsel except that, in either case, any agency may certify such individuals for such practice before it where it has done so by rule requiring investigation and examination of applicants for more than 7 years prior to the adoption of this Act.*

As is presently the case, the bill leaves the admission of nonlawyers largely to the individual agencies concerned. Since nonlawyers may not have had specialized training and may not have been otherwise licensed for professional duties, the second sentence of the section requires an agency to determine whether, in its informed judgment and after such examination or investigation as may be necessary, the applicant possesses such scientific training, experience, special competence, peculiar technical ability, knowledge of legal requirements, understanding of ethical

responsibilities, or other qualifications as may be requisite to the adequate performance of the duties of a practitioner for the protection of clients and the attainment or preservation of their rights.

It is to be noted that the requirement in sections 5 and 6 of "good standing" and "good moral character and repute" may, in the light of section 3 authorizing the use of advisory services, be ascertained in whole or part by the Credentials Committee on the basis of records or certificates of organizations or agencies engaged in licensing (upon examination and showing of good standing, moral character, and repute) and discipline of professional personnel such as lawyers or certified public accountants.

Previously licensed nonlawyer practitioners will be entitled, by the third sentence of section 6, to new credentials under this bill enabling them to continue in their practice. However, once so given credentials, they will thereafter and in all other respects be subject to the responsibilities, disabilities, and requirements applicable to those receiving credentials for the first time under the bill.

The last sentence of the section imposes two limitations. The first is that, where statutes permit representation only by "attorney" or "counsel," nonlawyers are not given the right to practice under this bill. The second is that nonlawyers shall not, under this bill, be admitted to practice in formal proceedings subject to sections 7 and 8 of the Administrative Procedure Act (see the comment respecting this subject in section 2 above). However, in either case, if for 7 years or more (as in the case of the Interstate Commerce Commission) an agency has been examining and licensing nonlawyers for

such practice, it may continue to do so under this bill. It is to be noted that this provision does not change the situation of accountants in tax matters before the Bureau of Internal Revenue because practice there is neither limited by statute to attorneys or counsel nor are the proceedings subject to sections 7 and 8 of the Administrative Procedure Act. The latter comprehend only those proceedings held pursuant to statutory requirement of a hearing and not otherwise exempted from such sections, in which rules of evidence are applied, cross-examination is a matter of right, and a record is made as a basis for decision and judicial review. These provisions do not in any event apply to other proceedings even though argument or views are heard and a record is in fact made for convenience as, for example, in informal proceedings of the Securities and Exchange Commission where lawyers or accountants present views.

DISCIPLINARY PROCEEDINGS

SEC. 7. *Every agency conducting proceedings subject to this Act shall by rule provide that for good cause any person holding credentials shall (1) be censured, or (2) be suspended from practice in the particular case in which misconduct occurs or from all cases before it for a period not to exceed ninety days, or (3) be subjected to proceedings for the revocation of credentials as hereinafter provided in this section and with or without suspension from practice by the agency concerned pending the final determination thereof. Where cause therefor appears and unless the holder consents to an order of revocation and surrenders all his credentials, the agency shall (1) in the case of any individual holding cre-*

dentials under section 6 issue an order revoking his credentials and (2) in the case of an individual holding credentials under section 5 either (a) refer the matter to appropriate and existing State or Federal judicial disciplinary authorities or (b) issue an order revoking his credentials if applicable statutes expressly provide both for such action by the agency and for judicial review thereof. Any agency order of censure, suspension, or revocation of credentials shall be entered only upon opportunity for hearing and upon the record thereof; and all such orders shall be subject to judicial review. Notice of all such proceedings shall be given the credentials committee, and, for the purposes of this section, it shall act in lieu of agencies in cases in which misconduct is unrelated to any agency proceeding and no interested agency undertakes to act in the case.

The first sentence of this section recognizes for the first time in statutory language that it is appropriate for administrative agencies to utilize a variety of disciplinary powers. The courts have long done so, whereas statutes relating to the administrative process have been barren or fragmentary on the subject. The second sentence recognizes the necessary difference in the exercise of the ultimate form of discipline in the case of the nonlawyer as compared with the lawyer. The former has not been admitted to practice by courts and hence is not subject to judicial discipline. The latter has been so admitted, there exists a ready forum for disciplinary proceedings, and any such action solely by an administrative agency is bound to have eff[illegible] upon a lawyer's standing before the bar. C[illegible]sequently, it is the design of this bill that the right to administrative practice shall, for appropriate cause, be revoked by administrative agencies in the case of nonlawyers and by judicial authorities in the case of lawyers except in the single case of the Patent Office, where by statute provision is made for both revocation by the administrative agency of a lawyer's right to practice and for judicial review thereof (35 U. S. C. 11). The bill would thus supersede the present authority of the Treasury Department (5 U. S. C. 261), the Veterans' Administration (38 U. S. C. 102), and the Interior Department (5 U. S. C. 493).

However, as stated above, agencies would be given the express authority to censure, to suspend for a limited period, to wholly revoke credentials or institute proceedings therefor, and in the latter case to suspend pending the final determination thereof. For the first time an administrative agency would be authorized by statute to refer cases to the appropriate State or Federal judicial disciplinary authorities. In the case of either a nonlawyer or a lawyer any absolute order of censure, suspension, or revocation by an administrative agency must be entered after an opportunity for hearing and upon the record thereof (thereby becoming subject to section 5 of the Administrative Procedure Act) and will be subject to judicial review (pursuant to sec. 10 of the Administrative Procedure Act). Of course, a mere reference of a case by an administrative agency to judicial authorities, without suspension of the right to practice meanwhile, would not require a hearing or be subject to such judicial review. For the exercise of these disciplinary powers it is provided that the Credentials Committee shall act in cases in which misconduct is unrelated to any agency proceeding and no interested agency undertakes to act in the case.

OPERATION AND EFFECT

SEC. 8. *Any person willfully violating any provision of this Act or rule lawfully issued hereunder, or knowingly submitting any false information required pursuant hereto, shall be fined not more than $5,000 or imprisoned for not more than one year, or both. No individual holding credentials under this Act and serving by appointment as an officer, employee, or consultant in any agency or branch of the Government of the United States shall act or receive compensation during such public service or within two years thereafter as an attorney, agent, or employee of other interests with respect to (1) any matter in which the United States is interested and he renders or has rendered such public service or (2) any matter factually related thereto; but in all other matters such an individual so appointed on a temporary (not to exceed two years), intermittent, uncompensated, or part-time basis or for the purpose of particular litigation or agency proceedings may (if otherwise qualified and unless limited by rule or written instruction of the appointing agency) during or after such public service so act or receive compensation. All statutory provisions, rules, or applications thereof in conflict with this Act are hereby repealed. No subsequent legislation shall be held to supersede or modify any provision or application of this Act except to the extent that such legislation shall do so expressly. If any provision of this Act or application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. The requirements of this Act respecting admissions to practice shall not take effect until six months after its approval.*

The first sentence, fixing a penalty for violations, is self-explanatory. The same may be said of the last four sentences. The final sentence of the section defers the effective date of the admission requirements for 6 months after the approval of the bill, in order to afford time to place in operation the machinery provided in sections 3, 5, and 6 of the bill as set forth above.

The second sentence of the section deals with a subject respecting which there is now a multiplicity of conflicting and diverse statutory provisions. This provision seeks to write into law for the first time (so far as holders of credentials under this bill are concerned) the present canon of professional ethics that no practitioner shall engage in representing anyone in a matter (or matter factually related thereto) in which he is simultaneously concerned, or with which he previously dealt ("investigated or passed upon"), as a public servant (Canon No. 36, see also sec. 4 above) except that the disability is limited to 2 years following termination of his public service. Secondly, the provision frees the holder of credentials (be he lawyer or nonlawyer) to undertake private representation in other matters if he is or has been a public servant on only a temporary, intermittent, uncompensated, or part-time basis or for particular litigation or agency proceedings unless at the time of his public service the agency concerned has provided otherwise by rule or written instruction. These modifications of existing law are desirable in order to provide a uniform rule respecting holders of credentials under this bill. Such persons will be subjected to the licensing controls provided by the bill. They will be permitted to serve their Government on occasion without unnecessary disabilities. It will thus, for example, be possible for a private practitioner to serve on the credentials committee as provided in section 3 of the bill.

ST. LOUIS PROGRAM

ADMINISTRATIVE LAW SECTION

September 5, 1949

W. JAMES MACINTOSH of the Philadelphia bar, Section Chairman, presiding at all sessions

Luncheon, Hotel Statler, 12:30 p.m.

SPECIALIZED COURTS OF ORIGINAL AND APPELLATE JURISDICTION

A Proposed Tax Court of Appeals, by Dean Erwin N. Griswold of the Harvard Law School

The Function of the Court of Claims, by Ernest L. Wilkinson of the D. C. bar

Debate, Municipal Auditorium, 2:30 p.m.

THE PROPOSED ADMINISTRATIVE COURT OF THE UNITED STATES

For the proposal, Louis G. Caldwell of the D. C. bar

Against the proposal, Alfred J. Schweppe of the Seattle bar

Discussion leader, Roscoe P. Thoma of the Iowa bar

Business Meeting, Auditorium, 3:30 p.m.

Committee reports including such subjects as proposed uniform rules, legislation respecting admissions to practice, examiners and other administrative personnel, state administrative law, immigration and naturalization, essay contest, etc.

Election of Section officers and Council members.

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